No. 85-571

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

Petitioners John R. Simplot, J.R. Simplot Company, Simplot Industries, Inc., P.J. Taggares, P.J. Taggares Company and SimTag Farms (the "Petitioners")[1] respectfully submit this Reply Brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed October 2, 1985, and in response to the Brief in Opposition of respondent Joseph Strobl ("Strobl") filed October 31, 1985.

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1 Pursuant to Rule 28.1 of this Court, Petitioners state as follows: the J.R. Simplot Company is a privately held corporation; Simplot Industries, Inc. is a wholly owned subsidiary of the J.R. Simplot Company; SimTag Farms was a private joint venture; and the P.J. Taggares Company is a privately held corporation.

REPLY ARGUMENT

INTRODUCTION

Respondent Strobl does not deny that this is a case of first impression with ramifications that reach far beyond this case itself. His brief is not really an argument against the importance of review by this Court, instead it is a plea for summary affirmance without full briefing and argument.

A substantial portion of Strobl's brief consists of a pejorative attack on the petitioners, as if this somehow should relate to the question of whether this Court should grant certiorari. Strobl labels the petitioners' conduct as "vicious" (Strobl Br. at 1, 5, 21)[2] and as having "tentacles in both the cash and futures . . . markets" (Strobl Br. at 12). Strobl asserts that Simplot and the Simplot Company had previously been convicted of a felony (Strobl Br. at 3) and that petitioner Taggares encouraged a broker to join in the "conspiracy" (Strobl Br. at 4). Refusing to confine his invective to petitioners, Strobl calls the petition itself an "affront" to the certiorari process (Strobl Br. at 5, 22).

Quite aside from its irrelevance, Strobl's invective is false. Simplot and the Simplot Company have never been convicted of any felony and no proof of such a conviction was ever offered at trial. Taggares did not encourage any broker to join in any "conspiracy" and there was no finding that he did. Nor was there any finding that Simplot and Taggares were involved in any conspiracy involving physical Maine potatoes.[3] And, far from being any "affront" to the certiorari process, the instant petition should be seriously considered by this Court.

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2 References in the form "Strobl Br." are to respondent's brief.

3 Strobl's irresponsible statements require mention that Chief Administrative Law Judge Hunt of the CFTC found, in separate administrative proceedings, that Simplot and Taggares did *not* engage in a "short" conspiracy, *In re Taggares, et al.*, CFTC Docket No. 77-13 (June 22, 1982), and that, in fact, it was the "longs" who manipulated the Maine potato futures contract in question. *In re Collins*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,960 (CFTC 1984).

REPLY POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION CONFLICTS WITH OBVIOUS CONGRESSIONAL INTENT

Strobl claims that the Second Circuit's decision comports with the intent of the drafters of the 1974 Amendments to the CEA[4] (Strobl Br. at 12-17). Strobl concedes, as he must, that Congress, in 1974, rejected three bills providing for treble damage recovery for conduct violative of the CEA. He asserts, however, that the threefold rejection by Congress implies nothing more than an intent neither to expand nor contract any treble damage remedies (Strobl Br. at 13). Such an assertion is specious, given the comprehensiveness of the 1974 Amendments to the CEA (*Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982)) and Congress' provision for recovery of single damages only for conduct proscribed by the CEA (Petition at 8-9).[5]

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4 References in the form "CEA" are to the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, *codified at* 7 U.S.C. § 1 *et seq.* Although the CEA was further amended by the Futures Trading Act of 1978, 92 Stat. 865, and by the Futures Trading Act of 1982, 96 Stat. 2294, *codified at* 7 U.S.C. § 1 *et seq.*, the Second Circuit correctly observed such post-1974 amendments to the CEA are not relevant here "because the activities at issue all occurred prior to their enactment." (A-7; 768 F.2d at 26).

5 Strobl fails to rebut Petitioners' demonstration that cases decided before the 1974 Amendments to the CEA, and relied upon by the court below, lend no support whatsoever for a treble damage award for conduct proscribed by the CEA (Petition at 13). Although he does point to one decision, *Peto v. Howell*, 101 F.2d 353 (7th Cir. 1938), his reliance upon that case is unavailing because it involved a corner of a physical commodity, a classic Sherman Act restraint of trade in goods. Even the Second Circuit makes no mention of *Peto v. Howell*, undoubtedly because of its manifest irrelevance.

REPLY POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS BETWEEN THE SECOND AND SEVENTH CIRCUITS BOTH ON THE SPECIFIC ISSUE OF TREBLE DAMAGE RECOVERY AND ON THE APPROPRIATE APPROACH TO STATUTORY CONSTRUCTION AND APPLICATION

Strobl contends that there is no conflict between circuit courts (Strobl Br. at 17-18). Although this is true in a literal sense because the pertinent decision in the Seventh Circuit was rendered by a district court (*see Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979)), it is undeniable that the holding in *Smith* was compelled by the reasoning of that Circuit on the precise issue, albeit with regard to securities and not futures contracts (Petition at 11-12).

Strobl simply dodges Petitioners' related argument that the decision of the Second Circuit flies in the face of the specific remedy rule—a fundamental canon of statutory construction enunciated by this Court[6] and followed by the Seventh Circuit in *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), and the court in *Smith v. Groover*, *supra*. By permitting Strobl to recover treble damages under the generic provisions of the antitrust laws, the Second Circuit has violated the specific remedy rule. Indeed, the Second Circuit expressly refused to apply the specific remedy rule in making its determination (A-16; 768 F.2d at 30).

Strobl also contends that the incipient conflict between *Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) and the

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6 *See, e.g., Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957), *quoting with approval, Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (citation omitted); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), and *see* Petition at 13-14.

decision of the Second Circuit is not significant.[7] First, Strobl asserts that *Smith* is distinguishable from the instant case on its facts (Strobl Br. at 18). This is nonsense. The Second Circuit explicitly recognized that the factual situation in *Smith* is "in all important respects identical to the one here." (A-14; 768 F.2d at 29). Second, Strobl states that *Smith* is the sole case in Petitioners' favor (Strobl Br. at 18). That argument misses the mark. Quite apart from the fact that *Smith* favors Petitioners on the precise issue of the interaction between the specific remedial provisions of the CEA and the generic provisions of the federal antitrust laws, *Smith's* statutory analysis is compelled by a long line of specific remedy rule cases propounded by this Court (*See* footnote 6 *supra*; Petition at 11-14). *Smith* is also compelled by numerous cases relating to the inability of a private litigant to recover treble damages in a closely analogous area—the securities field. *See, e.g., Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975); *see* Petition at 15 n.10.[8]

Strobl then proceeds to attack the holding in *Smith* by claiming, without substantive explanation, that *Smith's* reasoning is defective (Strobl Br. at 18-19). Although Strobl concedes that a private litigant may not recover treble damages for securities manipulation, he contends that *Smith's* reliance

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7 It is misleading, tricky really, for Strobl to imply that the existence of an incipient conflict with respect to an important and significant issue does not merit review by this Court. Indeed, his argument is completely undercut by *Shapiro v. United States*, 335 U.S. 1 (1948). *Shapiro* involved a writ of certiorari to the Second Circuit based upon a conflict between the Second Circuit and a district court decision in the District of Columbia Circuit. The district court case was appealed to the Supreme Court and was considered as a companion case to *Shapiro. See United States v. Hoffman*, 335 U.S. 77 (1948).

8 Strobl relies on *Terminal Warehouse Company v. Penn. R. Co.*, 297 U.S. 500 (1936) for the proposition that application of the antitrust laws overcomes the specific remedy rule. However, in *Terminal Warehouse*, Mr. Justice Cardozo limited plaintiff to the specific remedy provided under the Interstate Commerce Act (the "ICA"), notwithstanding the plaintiff's desire to recover treble damages under the federal antitrust laws for conduct specifically proscribed by the ICA.

on the rule of law precluding recovery of treble damages for securities manipulation has no application to the manipulation of commodities futures. Strobl's contention is bereft of merit because the fundamental similarity between commodities and securities "has been repeatedly recognized by Congress . . . by the courts . . . by the CFTC . . . and by the commentators." *See Leist v. Simplot*, 638 F.2d 283, 298 n.14 (2d Cir. 1980) *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). Not surprisingly, Strobl is unable to cite a single case in support of the spurious distinction that he chooses to draw between the regulation of the commodities and securities industries.

Finally, Strobl makes the argument that the 1978 and 1983 Amendments to the CEA somehow extinguish the necessity of reviewing the issues in this Petition. That argument makes no sense because the Second Circuit itself recognized that "[t]hese amendments are not relevant to . . . the activities at issue." (A-7; 768 F.2d at 26). The Second Circuit was correct on this point because neither the 1978 nor the 1983 amendments to the CEA provide for a treble damage remedy and their enactment have no bearing upon the the significant issues of first impression raised by this Petition.

REPLY POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION INTRODUCES DISPARITY IN THE APPLICATION OF FEDERAL LAWS TO ESSENTIALLY IDENTICAL INVESTMENT ACTIVITY

According to Strobl, common shares are nothing but pieces of paper, whereas commodities futures are somehow imbued with greater economic importance because they represent con-

tracts for the delivery of the actual commodity (Strobl Br. at 6-7). No meaningful support is given for this proposition because none exists. And, Strobl fails to explain why inconsistent standards should be imposed upon inherently similar industries that are already subject to far-reaching regulation. *See, e.g., United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). Nor do the pre-1974 reports of various government agencies, string cited at pages 10-11 of Strobl's brief, provide any justification for such a result.

REPLY POINT IV

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT HAS ANNOUNCED A STANDARD FOR TREBLE DAMAGE RECOVERY IN A FEDERALLY REGULATED AREA WHICH HAS CONSEQUENCES REACHING FAR BEYOND THIS CASE

Strobl does not take real issue with Petitioners' argument that the standard articulated by the Second Circuit has far-reaching consequences. He argues that the standard was properly applied in this case. That begs the argument that a standard, with such far-reaching consequences, should be the subject of review by this Court, especially when the lower court applied the standard in the context of a unique issue of first impression (Petition at 16).

CONCLUSION

Strobl's plea for summary affirmance should be rejected and certiorari should be granted.

Dated: New York, New York
November 12, 1985

Respectfully submitted,

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